ST. MARY LAKE LESSEES
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-8-A Decided April 3, 1995

Appeal from a determination that recreational leases on lower St. Mary Lake on the Blackfeet Indian Reservation had expired.

Affirmed as modified.

1. Indians: lands: Tribal Lands-Indians: Leases and Permits: Generally

The Bureau of Indian Affairs lacks authority to lease tribal land.

APPEARANCES: Matthew F. Allen, Esq., Cut Bank, Montana, for appellants.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants, who all leased lakefront property owned by the Blackfeet Tribe (Tribe) on Lower St. Mary Lake on the Blackfeet Indian Reservation, Montana, seek review of an August 23, 1994, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning their leases. 1/ For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision as modified in this opinion.

The properties at issue here were first subleased to appellants or their predecessors-in-interest by the St. Mary Lake Development Corporation under a master lease with the Tribe. The master lease had a term of

1/ The individual appellants and their lease numbers are: Eugene and Evelyn Gusharty (Lease R-1); Gary and Lesley MacDonald (Lease R-2A); Jean Haggis (Kelly) (Lease R-3); Donirv Holdings, Ltd., c/o Kelly Irving (Lease R-5); Mike Hyder (Lease R-6); Mary and Larry Koshney (Lease R-7); Leslie Shimp (Lease R-8); Sandra Sandilands (Lease R-13); Robert and Merilyn Arms (Lease R-14); Angela Shipp (Lease R-15); Gordon Dudley (Lease R-16); D.E. Bressey (Lease R-17); Gerald Westwood (Lease R-18); Lien Farms (1984) Ltd., Robert and Dorm Lien (Lease R-19); John and Barbara Warren (Lease R-20); Alan and Lois Alsgard (Lease R-21); Ralph Gast (Lease R-22); Mary Ann and Katerine Thys (Lease R-25); and Terry Webster (Lease R-26).

25 years, beginning on April 23, 1962, and expiring on April 23, 1987, and provided a renewal option for a further term of not to exceed 25 years, commencing at the expiration of the original lease. Appellants' subleases expired with the master lease on April 23, 1987.

At some time, but apparently prior to the 1987 expiration date, the St. Mary Lake Development Corporation was disbanded. When the original subleases expired in 1987, new leases were negotiated directly between the Tribe and appellants. According to appellants' statement of facts, BIA was not involved in these negotiations. The administrative record contains a representative lease, which was approved by the Superintendent, Blackfeet Agency, BIA (Superintendent), on September 21, 1987. No party disputes that the leases were uniform and were properly approved by BIA. Section 2 of the leases provides:

> That the term of this lease shall commence on June 1, 1987 and end on May 31, 1992. The Lease Agreement may be renewed at the option of TRIBE and with consent of LESSEE(S) for further terms of five (5) years each, commencing on June 1, 1992, June 1, 1997, and June 1, 2002.
>
> At the end of the first five year term, May 31, 1992, and each additional term referred to above, TRIBE and LESSEE(S) shall negotiate all terms of this Agreement pursuant to the covenants of this Agreement and pursuant to the mandates of the Department of Interior required five-year negotiation provisions, 25 CPR 131.
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> The Tribe shall not refuse to renew this lease Agreement on the above dates unless TRIBE will be able to realize and achieve a greater economic benefit by doing so.
>
> The Blackfeet Tribe is desirous of standardizing the end date of this lease Agreement and all other Canadian leases. Therefore, in order to achieve that goal this Lease and all other Canadian Leases will begin on June 1, 1987 for a primary term of five years and all additional terms, and rental shall be pro-rated in accordance therewith for the first year of this Lease. [Capitalization in original.]

Section 18 of the leases required appellants to give the Tribe notice of their intent to renew at least 12 months prior to the expiration of the leases. On or about May 13, 1991, BIA notified appellants that their leases would expire on May 31, 1992, and that they should contact the Tribe concerning negotiations for new leases. Appellants notified the Tribe and/or BIA of their desire to renew the leases on or about May 23, 1991. Despite several letters from BIA to the Tribe in 1991 and 1992, the Tribe did not respond.

On May 20, 1993, apparently in an attempt to force a resolution, the Superintendent wrote the Tribe, stating that because BIA had not received

any official action relating to the lea the leases were "being enforced by [BIA] until the * * * Tribe can deliver evidence of a better economic benefit" (May 20, 1993, Letter at 1). The Superintendent advised the Tribe that it could appeal to the Area Director.

The Tribe appealed, arguing, inter alia, that the leases violated both Article VII, section 3, of its Constitution ("No lease of tribal land to a nonmember shall be made by the tribal council unless it shall appear that no Indian cooperative association or individual member of the tribe is able and willing to use the land and to pay a reasonable fee for such use") and 25 CFR 162.5(e) ("No lease shall provide a preference right to future leases nor shall any lease contain provisions for renewal, except as otherwise provided in this part"). On September 20, 1993, the Area Director remanded the matter to the Superintendent with instructions to meet with the Tribal Council to address and resolve the issue through official tribal action.

On November 4, 1993, the Tribal Council passed Resolution No. 72-94, which resolved:

> 1. That the Blackfeet Tribal Business Council hereby formally declares that any and all leases with Canadian citizens shall not be renewed and that the aforementioned Canadian citizens shall have until July 1, 1994, to remove their property from the tribal lands which are being leased.
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> 2. That the Blackfeet Tribal Business Council hereby directs that the tribal lands referenced herein shall be offered to enrolled members of the Blackfeet Tribe at a fair and reasonable price.

On or about January 26, 1994, the Superintendent notified appellants of this resolution, and gave them appeal information. Appellants appealed. By letter dated March 4, 1994, the Superintendent notified appellants that he had been premature in giving them appeal information, because BIA had not yet reached a decision on its position in the matter.

By letter dated March 7, 1994, the Superintendent suggested to the Tribe that it prove it would be able to realize and achieve a greater economic benefit by declining to renew appellants' leases, in accordance with Section 2 of the leases. On April 8, 1994, the Tribe provided BIA with an analysis of the economic benefits it anticipated if the leases were not renewed. On April 14, 1994, it also passed Resolution No. 265-94, which again stated that the leases violated the Tribal Constitution, concluded that the leases had expired, and ordered the Blackfeet Legal Department to begin immediate action in Tribal Court seeking to evict appellants and to collect damages.

On April 29, 1994, the Superintendent notified appellants that their leases had expired, stating: "The * * * Tribe has based their decision on an economic impact statement prepared by professional members of the * * *

Tribe. Their statement was compiled [from] information obtained from the local bank, businesses, utility companies, the school system, as well as other sources" (Apr. 29, 1994, Letter at 1). This letter informed appellants of their right to appeal.

Appellants appealed to the Area Director, who affirmed the Superintendent's decision on August 23, 1994.

Appellants appealed to the Board, filing a detailed statement of reasons with their notice of appeal. Appellants elected not to file an opening brief. No other briefs were filed.

Discussion and Conclusions

Because it believes the argument raises an important underlying issue in this matter, the Board first addresses an argument appellants raised below, but only mentioned peripherally in their filings with the Board. Appellants contended that when the leases were negotiated in 1987, both their representatives, who were not assisted by an attorney, and the Tribe believed that BIA regulations precluded lease terms of more than 5 years. Appellants alleged that the intent was actually to create a 20-year lease, with rental renegotiations at 5-year intervals. The only support for this assertion appears in two letters in the administrative record which were written in 1993 and 1994 to BIA and the Tribe by two of the appellants.

In April 1962, when the original master lease was approved, regulations governing the leasing of trust land appeared in 25 CPR Part 131. This part was redesignated as 25 CFR Part 162, without substantive change, by notice published at 47 FR 13327 (Mar. 30, 1982). 25 CFR 162.8 provided in 1987, as it does presently:

> Leases granted or approved under this part shall be limited to the minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return to the owner consistent with prudent management and conservation practices, and * * * shall not exceed the number of years provided for in this section. * * * [U]nless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. * * *
>
> (a) Leases for * * * recreational * * * purposes shall not exceed 25 years but may include provisions authorizing a renewal or an extension for one additional term of not to exceed 25 years * * *. [2/]

2/ The same provisions appeared in 25 CFR 131.8 (1981).

As lessees of trust land, appellants had the responsibility to familiarize themselves with duly promulgated regulations governing their leases. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Chilocco New Life Center v. Acting Anadarko Area Director, 25 IBIA 273, 277 (1994); Racquet Club Properties. Inc., v. Acting Sacramento Area Director, 25 IBIA 251, 256 (1994). The fact that appellants were not represented by counsel in negotiating the 1987 leases not alter this responsibility, or cancel the effect of the agreement reached. The Board concludes that the leases negotiated in 1987 had 5-year terms, and allowed three renewals for terms of 5 years each, up to a total of 20 years; they did not have terms of 20 years.

Appellants first contend that Section 2 of the leases places two specific obligations on the Tribe: (1) to negotiate with appellants for renewal of the leases every five years, and (2) to renew the leases unless the Tribe will be able to realize and achieve a greater economic benefit by not renewing them.

The Board cannot agree with first assertion. The paragraph in Section 2 which relates to negotiation of new leases is preceded by a paragraph stating that the leases "may be renewed at the option of the Tribe." This provision gives the Tribe the right to determine whether or not to renew the leases. Cf., e.g., First Mesa Consolidated Villages v. Phoenix Area Director, 26 IBIA 18 (1994) (lease gave option to renew to the lessee). The Board cannot conclude that the Tribe was required to negotiate if it had determined not to renew the leases.

Assuming arguendo that appellants' second assertion is correct and that the lease provision can be enforced against the Tribe, contend that the Tribe can make the required showing only by the preparation of "an appropriate economic study usually in the form of a competent FEASIBILTY STUDY prepared by properly qualified experts in the field of Blackfeet Tribal economics and St. Mary's Lake area economics and development" (Sept. 22, 1994, Statement of Reasons at 8; capitalization in

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3/ Under 25 U.S.C. § 415 (1988) and 25 CFR 162.8(a), a lease may provide for only one lease renewal. The renewal at issue here, being the first renewal under the lease, would not run afoul of these statutory and regulatory provisions.

The terms “cancellation” and “termination” have been used during this proceeding. Appellants argue that because they have not breached the leases, there are no grounds for termination. These leases are not being cancelled or otherwise terminated. They expired by their own terms. Cf. HCB Industries, Inc. v. Muskogee Area Director, 18 IBIA 222, 224 n.2 (1990); BEKCO Oil and Gas Corp. v. Acting Muskogee Area Director, 18 IBIA 202, 204 (1990), and cases cited therein (dealing with expiration of oil and gas leases).

original). Appellants argue that the economic analysis prepared by the Tribe is not a proper feasibility study, that no competent foundation has been presented for concluding that the Tribe will be able to realize the economic benefits set forth in that study, and that the qualifications of the preparer of the analysis have not been shown. 4/ However, they do not provide any alternate analysis, and their attacks on the Tribe's analysis merely show their disagreement with the Tribe's premises and conclusions.

In appeals arising under 25 CPR Part 2, as this appeal does, the appellants bear the burden of proving that the BIA decision complained of is erroneous or not supported by substantial evidence. See, e.g., Miami Tribe of Oklahoma v. Muskogee Area Director, 27 IBIA 123 (1995). Appellants' unsupported attack on the Tribe's analysis does not carry their burden of proof. Cf. Miami Tribe, supra (request to take land into trust status); Nelson v. Acting Portland Area Director, 26 IBIA 85 (1994) (rental rate adjustment).

Appellants further argue that greater economic benefit was not the original reason the Tribe gave for declining to renew their leases, and note that no economic analysis of any kind was presented until April 1994.

The initial reason given by the Tribe for its decision was that the right to renew provided in the leases violated both Federal regulations and its Constitution. The Board finds it understandable that the Tribe might not believe it was obligated to produce an economic analysis when it believed the renewal provisions were illegal. However, when BIA required an analysis, the Tribe prepared it. Appellants retained possession of the leased properties until an analysis was prepared. The Board declines to find that the Tribe was required to renew the leases because it initially questioned the legality of certain provisions in the expired leases, rather than immediately preparing an economic analysis.

Appellants assert that BIA determined in 1992 that they had a right to renew the leases, and that the leases were renewed by BIA's action in billing them for lease years 1992-93, 1993-94, and 1994-95, and requiring them to provide bonds for the 5-year period from 1992-97.

The Board can find no document from BIA indicating BIA determined that the Tribe was required to renew the leases. The closest BIA came to such a

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4/ Although it is not clear from the copy in the record that this document was served on appellants, the Tribe's July 1, 1994, response before the Area Director identifies the preparer by name, states that he has a B.A. and Master's degree in Economics from the University of Montana and has done additional doctoral studies at the University of Oregon, and that the "analysis was prepared from actual statistica1 data gleaned from the annals of Reservation economy" (Response at 2) .

determinaticn was in the Superintendent's May 20, 1993, letter to the Tribe, which stated only that BIA would enforce the leases until the Tribe provided evidence that it could realize a greater economic benefit by not renewing. The clear implication of this letter was that, if the Tribe provided such evidence, the leases would not be renewed.

[1] Furthermore, and more importantly, BIA lacks authority to lease tribal land. See 25 U.S.C. §§ 415, 476(e) (1988); 25 CFR 162.2, 162.3(4); Lower Peoples Creek Cooperative v. Acting Billings Area Director, 23 IBIA 297, 301 (1993). No action taken by BIA could have the effect of leasing, or renewing a lease on, this tribal land.

Appellants contend that their due process rights were violated when they were not served with copies of the Tribe's 1993 notices of appeal. They argue that because they were not notified, they were injured by being prevented from participating in that appeal process. They further argue that a proper sanction against the Tribe for this due process violation is for the BIA "to block the actions of the Tribe in attempting to terminate these leases" (Sept. 22, 1994, Statement of Reasons at 15).

The record contains two notices of appeal filed by the Tribe, one dated May 24, 1993, and the other dated June 11, 1993. The first states that copies were sent to "Canadian Lessees - by individual address (see attached list)," although no list is attached to the record copy of the notice. The second notice of appeal does not show that copies were sent to appellants.

The record also contains the Tribe's statement of reasons, dated July 2, 1993. Attached to the statement of reasons is a formal certificate of service, which shows the names and addresses of all appellants, certifies that copies were sent to all, and is signed by the Tribe's attorney.

It appears possible that the Tribe did not send copies of its notices of appeal to appellants. Given the certificate of service attached to the statement of reasons, however, it seems more likely that the Tribe did serve this document on appellants. Appellants do not specifically contend that the Tribe failed to serve its statement of reasons on them, although their argument implies lack of service of this document as well as the notices of appeal.

Even assuming the Tribe did not serve either its notices of appeal or its statement of reasons on appellants, resulting in a violation of appellants' procedural due process rights, it would not be determinative of this appeal. The Board has held that the remedy for similar due process violations is allowing the aggrieved party the opportunity to participate fully. Cf., e.g., Welbourne v. Anadarko Area Director, 26 IBIA 69, 74 n.8 (1994) (Area Director's error in issuing a decision before the briefing time had expired was cured by the party's full participation in proceedings before

the Board). The Board finds that any prior due process violations have been cured in the present proceeding. 5/

Appellants allege that the Tribe is discriminating against them on the basis of national origin. They support this argument by asserting that, by the Tribe's own statements, its actions related only to leases held by Canadians, and related to all leases held by Canadians.

The Board cannot accept this argument. In reviewing the record, it finds that the phrases "Canadian lessees" and "Canadian leases" have been used by all parties as a shorthand way of referring to the group of leases which are under discussion. The Board finds no evidence of discrimination against appellants on the basis of national origin.

Appellants contend that the Area Director improperly considered allegations that some of them had sold, or were attempting to sell, their leases. They assert that none of them would have sold the leases but for the Tribe's failure to renew the leases.

The Board finds no evidence that the Area Director considered possible lease sales in reaching his decision. Rather, it appears that this discussion related to the sole question of whether all appellants were still pursuing the appeal. Because the Area Director observed that even if some had sold their leases, no lease assignments had been approved, he made no determination concerning whether all, or only some, of the original appellants were still appealing.

Finally, appellants ask that even if the Board holds against them, they be allowed to remain on the leased properties until May 31, 1995, so that they can remove as many fixed improvements as possible after the anticipated end of winter in the area. It appears from the record that appellants have paid rent through May 31, 1995. Considering that Section 20 of the expired leases provided a 60-day period after the termination of the leases in which the lessees could remove improvements, provided the Tribe did not wish to purchase the improvements at fair market value, and considering that this decision is the final Departmental action holding that the leases have expired, the Board finds that appellants should be allowed to remove their improvements from the property until May 31, 1995.

As stated in the Area Director's decision, lease rentals held in escrow by BIA should be prorated if necessary and released to the Tribe for that

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5/ It is not clear that appellants received all of the Tribe's filings in the 1994 proceedings before the Area Director. See, e.g., note 4. However, a copy of the very detailed table of contents to the administrative record was sent to appellants with the Board's Oct. 18, 1994, notice of docketing. Appellants did not request copies of any documents in the record, or otherwise object that they did not have any of those documents.

time in which each appellant, considered individually, was in possession of leased property, and refunded to each appellant who vacates the property prior to the conclusion of the period for which rental has been paid.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 23, 1994, decision of the Acting Billings Area Director is affirmed as modified to allow appellants until May 31, 1995, to remove their improvements. 6/

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge

6/ Any arguments not specifically addressed were considered and rejected.